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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1170

THOMAS MARTIN AUSTIN, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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May it please the Court:

If the only reason for responding to the Government's brief in opposition were its erroneous statement (p.2) that the petition for certiorari was filed on March 17, 1975, this brief (authorized by Rule 24(4)) would not be submitted since the Government does not claim that the petition was filed too late. The petition was in fact filed on March 1, 1975, within thirty days after the court of appeals decision (docketing being delayed until after the Court had passed on petitioners' motion to proceed in forma pauperis).

There are, however, further reasons. The utterly remarkable positions taken by the Government, none of which is likely to command the assent of the Court, are interesting as showing the

poverty of the arguments against acceptance of jurisdiction. Not only does the Government, by its statement of the "Question Presented" (p.2) attempt to remake the case presented below -- ignoring the question of availability of Selective Service files (which prompted the Solicitor to authorize the application for appellate review after he had refused an earlier request of the eager young Assistant U.S. Attorney for authorization to seek review of the previous appointment of counsel). Not only does the Government omit mention of the parallel and virtually identical litigation now pending in the Ninth Circuit Court of Appeals (concerning which, more hereafter). The Government also takes the curious position that although petitioners would have had standing to oppose a certiorari petition -- if the court of appeals had denied all and not merely part of the relief sought by the Government -- but lack standing to file the present petition (footnote 7, pp. 6-7). Further, it evades the main legal issue (as did the court of appeals) by ignoring (pp. 8-10) the obvious source of district court jurisdiction to take the questioned actions -- the long-recognized power of any court to intervene sua sponte against abuse of its processes. And the Government carefully avoids taking issue with our petition in so far as we demonstrate the great public importance of the questions presented.

Even these things might not have led us to submit the present brief, since the Court is well able to perceive the hollowness of the opposition to certiorari. What does prompt us to speak, however, is that the brief in opposition, seen in its procedural context (of which the Court has not yet been fully informed) illustrates perfectly the soundness of our contention that the Government's basic effort is to maintain an executive monopoly over the one aspect of the criminal process in which the courts have thus far hesitated to review executive abuses -- the treatment of indicted persons who have not surrendered or been arrested.

For the Court to understand this fully, we must describe the procedural status of the Ninth Circuit case referred to above. (Upon request, we shall substantiate these facts by affidavit; but they are well known to the Government, and we doubt that they will be denied.) Judge Weinstein's appointment of counsel was by no means an isolated event. Perceiving the same dangers that led him to appoint counsel for the absent defendants, district judges in various parts of the country took similar action. One of those judges, Chief Judge Samuel P. King of the District of Hawaii, likewise took the further step which triggered the mandamus/prohibition application in the present case: he ordered the Government to open the defendants' Selective Service files for inspection by the court-appointed counsel. On January 8, 1975, shortly after petitioning the Second Circuit Court of Appeals for mandamus and prohibition in the present case, the Government filed a petition presenting exactly the same issues (and couched in almost the same language) to the Ninth Circuit Court of Appeals in an effort to frustrate the efforts of Judge King (United States v. Samuel P. King, District Judge, et al., C.A. 9 No. 75-1061). On January 22, 1975, the Ninth Circuit denied the petition without opinion. A true copy of the Court's order is attached hereto as Appendix A. The Solicitor General thereupon authorized application for certiorari in this Court.

Eight days later, on January 30, 1975, the Second Circuit Court of Appeals rendered its decision and opinion in the present case. Relying thereon, the Government petitioned the Ninth Circuit Court of Appeals for rehearing, which was granted; and the case has since been fully briefed and submitted on the merits but has not yet been decided.

We believe, reasonably, that the Government's tardiness in responding to our petition for certiorari resulted from its uncertainty as to how the

Ninth Circuit would rule. (Certainly there is nothing in the brief in opposition which would take 98 days to prepare -- from March 1 to June 6 -- which is nearly twice the generous 50-day period which the Government is allowed by Rule 24(1).) If the Ninth Circuit adhered to its original ruling, there would be a clear conflict of circuits which would call for review at the Government's instance in one case and at our instance in the other, and the Government might well refrain from opposing our petition. If, on the other hand, the Ninth Circuit followed the Second, the Government might well take a different course. Because we too wished this Court to know, when it passed on our certiorari petition, whether there was a conflict of circuits, we raised no objection to the delay and did not request the Clerk to distribute our petition to the Court immediately after April 20 as we had a right to do.

In this month of June, however, the Government appears to have perceived a way in which it might be able to have its cake and eat it too. This Court's summer recess was and is imminent, and June 19 is the last conference day this term for rulings on certiorari petitions, so we are advised by the Clerk. Accordingly the Government has abandoned its tactic of delay, and has proceeded to file its brief in opposition. Predictably, the Clerk thereupon distributed the papers to the Court immediately, on June 9, and the case has been scheduled for a ruling on June 19.

We do not criticize these procedural tactics, inconsistent as they might seem with the Solicitor General's traditional role as adviser to the Court rather than artful litigant. We do, however, point out that this course of action is best accounted for by the Government's strong desire to preserve the executive monopoly over the treatment of absent

defendants in criminal cases. By hook or by crook, the Government wants to win both of the pending cases without any increased danger of losing either, and thus maximize its chances of freezing off judicial intervention against executive abuses of the type feared by Judges Weinstein and King (among others) and described in our certiorari petition.

Other aspects of the brief in opposition corroborate the view that it is dominated by the Government's solicitude of the said executive monopoly. Its position that the present petitioners have standing to take an adversary position if the Government seeks appellate review, but not to seek appellate review themselves (footnote 7, pp. 6-7) is made from the whole cloth. It finds no support whatever in the provisions of the applicable rules (Fed. Rules App. Proc. 21(b) and this Court's Rule 21(4)), and can only be understood as a claim of special executive prerogative to deal with non-appearing defendants. The astonishing insistence that petitioners' attorney is a "stranger to the case" and the accompanying reliance on Rosenberg v. United States (footnote 8, p. 7) rest on the assumption that appointment of counsel by a district judge -- an officer appointed by the President, confirmed by the Senate, and bound by the same oath as the Justices of this Court -- does not take the appointed counsel out of the category of officious intermeddler.

This assumption is in effect a contention that the appointment of counsel was not only erroneous but absolutely void, despite the unquestioned power of federal courts to designate masters and amici curiae to assist them in the discharge of their judicial duties. See, e.g., Cheng Fan Kwok v. Immigration and Naturalization Service, 392 U.S. 206, 210(1968). Such an assumption suggests a most urgent need to foreclose judicial inquiry into the often slipshod work of executive personnel (including, but not limited to, Selective Service boards) which has so often merited this Court's

censure. The assumption implies a wholly unwarranted denial of the power of federal courts to prevent abuse of their processes.

In this connection we think we are bound to state, in view of the Government's unveiled accusation that an attorney appointed by the district court without a defendant's knowledge or prior approval is suspect as a mere interloper who will be free to disregard his client's interests, that the effect of the appointment is to subject the attorney to all the obligations of loyalty and industry which are imposed by the statutes and the canons of professional responsibility. And in view of the Government's emphasis on the absence of ratification by the defendants, we are bound to state that no single defendant whom counsel has succeeded in reaching has declined to ratify Judge Weinstein's appointment by sending in his written authorization. As the court of appeals opinion shows, two such authorizations had been received even before the oral argument in that court; and in the intervening months, additional authorizations have been received. Authorizations are now in hand from the defendants Collura, Friedman, Henry, Luerssen, Nolan, Powers, Salzmann, Sleeth, and Territo. There is no reason to doubt that, but for the Goverment's application for premature relief in the court of appeals, all or nearly all of the petitioners would have sent in such authorizations prior to action on their cases by the district court. What reason could they possibly have for refusing to do so?

Finally, we comment briefly on a few other points:

1. The Government's reliance on the Molinaro case, and other older cases likewise holding that this Court has power to adjudicate the cases of absent defendants but as a matter of judicial policy will ordinarily not exercise that power (p. 8) is misplaced. The Molinaro distinction

between power and judicial policy is meaningless unless it is understood to mean that each court's own sound discretion is to be determinative on the question whether it will entertain a claim on behalf of an absent defendant. It is one thing to hold that this Court will not decide Molinaro's case; it is quite another thing to say that an appellate court is justified in upsetting the district court's discretionary decision -- made in the very unusual context provided by the conditional amnesty program and the national reconciliation effort - to inquire into the validity of indictments of alleged Selective Service violators.

2. The Government makes no response whatever to Point II of the certiorari petition, which points out that the court of appeals has exceeded its own jurisdiction in entering the judgment below. It is fair to assume that the Government considers our Point II to be unanswerable.

3. The Government's response to our Point III is the wholly conclusory assertion (footnote 10, p. 10) that "[t]here is no occasion for this Court to consider" the effect of the recent amendments to the Freedom of Information Act, which became effective after entry of the court of appeals' judgment. Even a remand to the Court of Appeals for consideration of that question is evidently considered to be unthinkable -- but the Court is not told why.

The Government adds a wholly erroneous assertion that exemption 6 of the said Act, and the Privacy Act of 1974, provide an additional reason for insulating the Selective Service files from judicial scrutiny. As pointed out at page 27 of our petition for certiorari, the recent amendments make it clear that protection of personal privacy is to be afforded not by the withholding of entire files, but by the application for protective orders after in camera inspection by the district court. 5 U.S.C. §552(a)(4)(B); Clark, Holding

Government Accountable: The Amended Freedom of Information Act, 84 Yale L. J. 741, 753(1975). The Privacy Act of 1974 has no bearing. 5 U.S.C. §552a(b)(2).

4. Finally, the Government understandably refrains from saying a word to deny the extreme importance of the issues. Were it to do so, it might find itself embarrassed in seeking review of the Ninth Circuit's decision in United States v. King if that court adheres to its January 22 decision. The importance of the issues may therefore be taken as conceded.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

Louis Lusky
Attorney for petitioners

June 12, 1975